

PASCHE DOUGLAS
Claimant

WAL-MART

AMERICAN HOME ASSURANCE COMPANY
Insurance Carrier

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ORDER

Respondent appeals the November 26, 2001, preliminary hearing Order of Administrative Law Judge Julie A. N. Sample. Claimant was granted medical benefits after the Administrative Law Judge found that claimant had proven for preliminary hearing purposes that she suffered accidental injury arising out of and in the course of her employment.

Respondent contends claimant has failed to prove accident arising out of and in the course of her employment.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of her employment on the date alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, a cashier for respondent, alleges she suffered accidental injury on July 15, 2001, when she reached across the checkout conveyor and into a customer's cart, lifting a microwave, scanning the microwave across the scanner, and returning it to the customer's cart. Claimant felt a pop in her back after this incident and, later that evening, began suffering pain in her back. Claimant advised respondent the next day, after working several hours, that her back hurt and she needed medical treatment. Claimant was referred to Shawnee Mission Medical Center emergency room in Shawnee Mission,

Kansas, where she was treated for a lumbosacral strain and returned to work with a 20-pound lifting restriction.

Claimant continued working until approximately August 8, 2001, when she was terminated for falsifying a workers' compensation claim.

Claimant's description of the injury was not contained in any of the original medical reports, but was mentioned in the Medical Record Patient Information form dated July 18, 2001, from OHS-COMPCARE of Kansas, Inc. There was the mention of a microwave in claimant's Workers Compensation Request For Medical Care form filled out on July 16, 2001, and signed by claimant.

The Board notes claimant's initial report to Shawnee Mission Medical Center emergency room on July 16, 2001, shows a date of accident of July 16, rather than July 15. The significance of this date is unclear, as it was not discussed by the parties.

Respondent provided evidence from its store manager, Allan Cox, and its district loss prevention supervisor, Reck Staggs. Along with the testimony of Mr. Cox and Mr. Staggs, the respondent provided a videotape showing claimant's work station on July 15, 2001. It also provided a computerized printout which details every sale going through claimant's register on the alleged date of accident. Claimant testified that she was working at register 11, but respondent's records indicate claimant was working at register 8 that date.

Claimant's testimony was that she suffered injury while lifting the microwave between 6:30 p.m. and 6:45 p.m. on July 15. Respondent's records indicate claimant was on lunch break between 6:01 p.m. and 7:19 p.m. on that date.

Additionally, respondent's records indicate the only microwave claimant sold that day was sold at approximately 8:39 p.m. The videotape shows claimant moving the microwave across the scanner. However, the videotape does not show claimant lifting the microwave from the cart or placing the microwave back into the cart. The videotape shows the microwave came to claimant on the conveyor belt and the customer removed the microwave from the conveyor belt, returning it to the cart. Other than claimant's tipping the microwave to scan it, it does not appear as though claimant lifted the microwave at any time.

The Administrative Law Judge in the preliminary Order stated that she was persuaded that claimant was injured as she alleged, although it would appear "that either the date or the time is inaccurate. In either instance, she has consistently maintained the fact of her injury."

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g). Claimant, during her interview both with Mr. Cox and with Mr. Staggs, was adamant about the time and circumstances surrounding her injury. Here, the evidence clearly contradicts claimant's allegations. Claimant was not working at the time she alleges she suffered this injury. Additionally, the videotape and computer printout evidence shows claimant sold only one microwave on the date of the alleged accident and that was approximately two hours after claimant's alleged accident supposedly took place. Finally, the videotape shows claimant did not handle the microwave as she described.

Claimant has been adamant in her description of this accident. However, the greater weight of evidence in this record contradicts claimant's allegations of a work-related injury on July 15, 2001, at any time during claimant's shift. The Appeals Board, therefore, finds that claimant has failed to prove that she suffered accidental injury arising out of and in the course of her employment on the date and in the manner alleged. The Appeals Board, therefore, reverses the award of benefits in this matter.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated November 26, 2001, should be, and is hereby, reversed, as claimant has failed to prove that she suffered accidental injury arising out of and in the course of her employment on the date alleged.

IT IS SO ORDERED.

Dated this ____ day of February 2002.

BOARD MEMBER

c: David B. Mandelbaum, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director